EMPLOYMENT TRIBUNALS

Appellant: Vavavoom Hairdressing Limited

Respondent: The Commissioners for HM Revenue and Customs

HELD AT: Manchester **ON:** 28 April 2017
13 June 2017 (In Chambers)
31 August 2017 (In Chambers)
20 December 2017 (In Chambers)

BEFORE: Employment Judge Holmes

REPRESENTATION:

Appellant: Mr P Dawson, Director
Respondent: Mr S Redpath, Counsel

FURTHER RESERVED JUDGMENT

It is the further judgment of the Tribunal that the notice of underpayment issued on 2 December 2016 is further rectified to provide that the total shortfall in payment of the national minimum wage is £401.68, and the penalty charge due is accordingly **£803.68**

REASONS

1. By a reserved judgment sent to the parties on 8 September 2017 the tribunal held that the appellant's appeal against the notice of underpayment issued on 2 December 2016 succeeds in part. Para. 2 of that judgment referred to the rectification of the pay reference period in column (e) , but at para.3 the tribunal expressly did not rectify the terms of columns (f) (g) and (j), or the consequential figure for the penalty charge. The tribunal invited the parties to consider comprising the appeal by agreeing upon a rectified penalty charge.

2. Following the judgment, the respondent write to the tribunal and the appellant on 28 September 2017 setting out a proposed revised schedule, under the terms of which the revised penalty charge would be £1739.20.

3. By letter of 1 October 2017 the appellant wrote to the tribunal and the respondent arguing that the respondent had not correctly applied the findings of the tribunal, and contending that the penalty charge should be further reduced.

4. As the parties were not in agreement, the tribunal wrote to them on 18 October 2017. In that letter the tribunal observed that the appellant's contentions that the respondent had not applied the findings of the tribunal in relation to paragraphs (a) to (d) of the appellant's letter. Further, the tribunal pointed out that the respondent's proposed revised penalty exceeded the maximum that the tribunal's judgment had found was payable, on any permutation of its findings.

5. The tribunal accordingly informed the parties that it could rectify the notice to require payment of a penalty charge of more than £803.36, or less than £228.00, at least, not without a further hearing. The parties were encouraged to seek to reach an agreement.

6. Thereafter the appellant wrote to the tribunal on 5 November 2017, and the respondent on 6 November 2017. In the appellant's letter, it accepted the tribunal's judgment and the clarification thereof in relation to the minimum penalty charge that could be imposed, and did not seek to go behind that.

7. The respondent in its letter accepted the points made in the tribunal's letter of 18 October 2017, and that it had erroneously calculated the penalty payable in the light of the findings of the tribunal. The respondent agreed to the penalty charge being rectified to the £803.36, the maximum it could be under the tribunal's judgment.

8. That left two, related, issues between the parties, identified in the tribunal's previous judgment as issues 6 and 7, and referred to in the first two bullet points in the appellant's letter of 5 November 2017. These issues arise out of the alleged provision to the workers in question of hairdressing services, in respect of which there were two potential consequences for the assessment of whether they were paid the national minimum wage, and if not, by how much they were underpaid.

9. The issues are twofold, in that the first is whether the time that the workers were receiving such treatments is not, as the appellant contends , to be counted in the hours that the workers worked for the purposes of calculating whether they received the NMW. The second is whether sums deducted from the wages of the workers in question for these treatments are also to be considered allowance deductions which do not have the effect of reducing the workers' pay for the purpose of the NMW legislation.

10. The appellant also seeks to be allowed to submit four items of further evidence in connection with these issues. The appellant has sought that these issues be determined by way of written representation, then via an oral hearing, and lastly by a full tribunal hearing. The tribunal does not understand the difference between the latter two.

11. The respondent's response to these issues in its letter of 6 November 2017 is that whilst it is not uncommon for hairdressers to work on each other's hair, if clients come in they are taken off this activity. A reduction in time for this purpose would not, therefore be appropriate. The respondent does not, however, expressly address the second issue as to the effect of any deduction from a worker's wage in respect of such treatments. The respondent, however, is content to rely upon written representations.

Discussion and Findings.

12. The tribunal has had to consider how to address these remaining issues. Should it hold a further hearing, and permit the appellant to advance further grounds of appeal, not included in the original grounds, or the evidence before the tribunal in the oral hearing, being only submitted in the course of the appellant's letter to the tribunal of 11 July 2017? This was a response to the tribunal's letter of 23 June 2017, which merely sought actual pay information for the two workers in question for specific periods in relation to the pay reference period which was at the heart of the issues to be determined by the tribunal.

13. The appellant has contended that this information was available to the respondent to put into the Bundle, and in its unfamiliarity as an unrepresented party, the appellant did not realise the consequences of the omission of this material upon its appeal.

14. That may be so, but, as observed in paras. 66 to 68 of the tribunal's previous judgment., all this is new argument, and new evidence. Issues 6 and 7 never formed any basis of the appellant's grounds of appeal until after the hearing in the letter of 11 July 2017. As it is, the tribunal has taken this material into account, even as it may be disputed, to ensure that there is no prospect of the appellant being to argue that no sum was payable at all, so as to entitle the tribunal to rescind the notice in totality. As the tribunal's previous judgment demonstrates, even allowing the maximum effect as contended for by the appellant of these alleged further reducing factors, there would still have been underpayment, though in a modest amount, but sufficient to preclude rescission.

15. Thus, having regard to the overriding objective, and proportionality (the amount at stake is £575.36 (£803.36 - £228.00) , and the need for finality in litigation, and allowing for the appellant's lack of legal knowledge or representation, the tribunal does not exercise its discretion to, in effect, allow amendment to the grounds of appeal, and allow the introduction of new evidence after the hearing had concluded, or to hold a further hearing, whether oral or in writing, and the appellant may not rely upon Issues 6 and 7 to further reduce the shortfall in NMW , and hence the penalty due under the rectified notice of underpayment. The tribunal accordingly confirms the rectification in the revised notice of underpayment to show the sum of £803 as the penalty charge due.

Employment Judge Holmes

Dated: 20 December 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 December 2017

FOR THE SECRETARY OF THE TRIBUNALS.